



In the United States Patent and Trademark Office

Appellant: Forte
Serial No.: 09/374,117
Confirmation No: 3340
Filed: 08/16/1999

Docket No.: 13969.1
Group: 1771
Examiner: Terrel H. Morris
Date:

For: Multilayer Breathable Film and a
Method for Making a Multilayer
Breathable Film

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Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 1.192 Appellant respectfully submits this Brief in support of Appeal of Examiner Leanna M. Roche's **Final Rejection** of claims 26-29 and 32 which was mailed on 12-Feb-03.

On 12-Jun-03, Appellant, pursuant to 37 C.F.R. 1.191, mailed a request for a one month extension of time and a timely Notice of Appeal. Thus, the time period for filing this Brief was set to end on 12-Aug-03. Pursuant to 37 C.F.R. 1.191, Appellant hereby requests a one month extension of time (attached) in which to file the Appeal Brief. Thus, the period of response is to be extended until 12-Sept-03.

In accordance with 37 C.F.R. 1.192(a) this Appeal Brief is filed in triplicate.

Real Party In Interest

The present Application has been assigned to Kimberly-Clark Worldwide, Inc.

Related Appeals and Interferences

There are no related appeals or interferences known to Appellant, Appellant's representative or the assignee of this application that will directly affect, be directly affected by or have a bearing on the Board's decision in this appeal.

Status of the Claims

Claims 26-29 and 32 remain in the application with claims 26-29 and 32 being finally rejected.

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Status of Amendments Filed Subsequent to Final Rejection

No amendment has been filed subsequent to the Final Rejection. A request for reconsideration was filed (Paper No. 22) on 12-May-03, and an advisory action was mailed on 20-May-03 indicating that the reconsideration did not result in allowance of any claims.

Summary of the Invention

The present invention is directed to a multilayer film of at least three layers and particularly suited for medical applications providing a barrier to microorganisms and blood and other bodily fluids. In accordance with the invention, the film includes outer, substantially particulate filler free, monolithic layers of a hydrophilic polymer. These layers are bonded using a filled adhesive microporous core layer that is a barrier to liquid but allows gaseous water, i.e. moisture vapor, to pass due to the presence in the core layer of microvoids in the range of about 27.6% to about 42%. The filler is further defined in terms of particle size. Preferred claimed embodiments are coextruded films, and ranges of specific volume ratios for the three film layers.

The Issues Presented

Are claims 26-29 and 32 anticipated by USP 6,075,179 to McCormack et al. ("McCormack") in the sense of 35 USC 102(e).

Grouping of the Claims

Claims 26-29 and 32 stand or fall together.

Argument

Citing *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) MPEP 2131 provides "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. An anticipating reference must describe the [patented] subject matter with sufficient clarity and detail to establish that the subject matter existed in the prior art and that such existence would be recognized by persons of ordinary skill in the field of the invention. [Citations omitted.] *Crown Operations International, Ltd. v. Solutia Inc.* CAFC 289 F.3d 1367 (2002). Anticipation by inherent disclosure is appropriate only when the reference discloses prior art that must *necessarily* include the unstated limitations. [Citation omitted.] [Emphasis in original.] *Transclean Corporation v. Bridgewood Services, Inc.* 2002 WL 1012878, -- F.3d -- (2002). Appellant respectfully submits that these principles require reversal of the

Examiner's rejection of the claims on appeal.

As summarized above, Appellant's claims require a film of at least three component layers including a filled adhesive core layer that is stretched to create about 27.6% to about 42% microvoids and, on either side, a monolithic layer of a substantially filler free hydrophilic polymer. The result passes moisture gas but acts as a barrier to water or bodily fluids. McCormack also describes multilayer films with a filled core layer and skin layers resulting in a combination that acts as a liquid barrier and passes moisture vapor. McCormack expressly teaches, however, that to improve adhesion to the core, the skin layers may be made more adhesive (col. 4, li. 15-18 and 35-40, for example). As a further indication, the skin layers of the McCormack examples incorporate anti-block compounds to aid in preventing undesirable film "blocking" or adhesion between contact layers of the film. There is no teaching in McCormack of use of an adhesive core. Moreover, the McCormack anti-block compounds contain a filler such as diatomaceous earth (see col. 3, li. 55-63 for filler descriptions) and would not result in a substantially filler free layer as claimed by Appellant. Further, there is no description in McCormack of the void content of the core layer, McCormack teaches a desired filler level of at least 60% by weight, col. 2, li. 34, whereas Appellant's preferred range is 50% to 70% and, since pore volume is a factor of stretching as well, the teachings of McCormack in this regard is not express. Appellant respectfully submits that it must be accepted that McCormack does not expressly anticipate the invention of claims 26-29 and 32 on appeal.

Notwithstanding this information, the Examiner's final rejection finds that the McCormack structure "must expressly read on Applicant's 'adhesive' core layer" because "the same" compositions or "substantially identical" core layers are used and the layers "attach". In a prior Action (Paper No. 19) the Examiner held that because both the McCormack and the core layers of the claims on appeal could contain a polyolefin and filler and the skin layers of both structures could contain some of the same resins, the structures were "substantially identical". The Examiner has not pointed to any examples of substantially identical structures in the reference, nor is Appellant aware of any. It is well known that polyolefin resins of widely varying properties are available and that the properties of the composition (adhesive or otherwise) are a function of the composition as a whole and not just the presence of a polyolefin or, in the case of the skin layers, another resin. Similarly, the Examiner finds inherent the per cent volume ratios based on the same alleged "identity" and in the absence of any teaching in the reference that would support such a finding. Clearly, the Examiner's inherency argument must fail in the absence of any identity between the reference and the claimed structure. Equally significant, the Examiner's position ignores express limitations such as substantially filler free skin layers and microorganism barrier properties. With respect to such barrier properties, McCormack makes no claim, and the skin layers of the examples include polymer combinations such as EMA and cattaloy that lack

compatibility and would tend to separate, thus reducing the high barrier needed for blocking microorganisms. Appellant respectfully submits that the Examiner's burden of establishing a *prima facie* case has not been met.

Appendix – The Claims On Appeal

The claims on appeal are:

26. A multilayer breathable film having the combination of properties of:

- (i) providing a barrier to microorganisms; and
- (ii) providing a barrier to blood and bodily fluids;

said breathable film comprising at least a three-layer film having as a minimum the following structure: C:D:C;

where C comprises an outer monolithic layer containing a hydrophilic polymeric resin capable of absorbing and desorbing moisture and providing a barrier to water and microorganisms, said C layer being substantially free of particulate filler; and, D comprises a microporous adhesive core layer for bonding said C layers together, wherein said C layer substantially prevents the buildup of particulate filler material on a die during formation of said multilayer breathable film, and wherein said microporous adhesive core layer comprises particulate filler having an average particle size between about .8 microns and about 3 microns, where upon stretching the microporous adhesive the core layer has microvoids in a range from about 27.6% to about 42%, said microporous adhesive core layer being constructed and arranged to provide the passage of gaseous water but substantially prevent the passage of liquid water.

27. A film according to claim 26, wherein said layers have the following volume ratio:
about 2 to about 98% by volume for said D layer; and

about 1 to about 49% by volume for each C layer, the volume % being based on the total volume of said breathable film.

28. A film according to claim 26, wherein said layers have the following volume ratio:

about 80 to about 98% by volume for said D layer; and

about 1 to about 10% by volume for each C layer, the volume % being based on the total volume of said breathable film.

29. A film according to claim 26, wherein said layers have the following volume ratio:

about 90 to about 98% by volume for said D layer; and

about 1 to about 5% by volume for each C layer, the volume % being based on the total volume of said breathable film.

32. A multilayer breathable film having the combination of properties of:

- (i) providing a barrier to microorganisms; and

(ii) providing a barrier to blood and bodily fluids;

said breathable film comprising at least a coextruded three-layer film having as a minimum the structure C:D:C; wherein C comprises an outer monolithic film layer containing a hydrophilic polymeric resin capable of absorbing and desorbing moisture and providing a barrier to water and microorganisms, said C layer being substantially free of particulate filler; and, D comprises an adhesive core film layer for bonding said C layers together, the adhesive core film layer including micropores, the micropores being constructed and arranged to permit the passage of gaseous water and to provide a barrier to the passage of liquid water;

wherein said adhesive core film layer further comprises particulate filler having an average particle size between about .8 microns and about 3 microns, where upon stretching the adhesive core film layer has microvoids in a range of about 27.6% to about 42%; and further wherein the adhesive core film layer is bonded to the outer monolithic film layers along an interface, the bonding at the interface being substantially complete and uniform.

Conclusion

For the reasons stated above it is Appellant's position that the Examiner's rejection of claims 26-29 and 32 has been shown to be untenable and should be **reversed** by the Board.

Please charge the \$320.00 fee, pursuant to 37 C.F.R. 1.17(c), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutorial fees which are due may also be charged to deposit account number 11-0875.

The undersigned may be reached at: 770-587-8096.

Respectfully submitted,

Forte

By: 

William D. Herrick

Registration No.:25,468

CERTIFICATE OF MAILING

I, William D. Herrick, hereby certify that on 5-Sept-03 this document is being deposited with the United States Postal Service as first-class mail, postage prepaid, in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

By: 

William D. Herrick